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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 479

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,

Petitioner,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered on May 24, 1956. The Court of Appeals affirmed a judgment of the United States District Court for the Northern District of California, Southern Division, in which it was

ordered that your petitioner should take nothing by her complaint.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court (Appendix, p. 1) is not reported. The opinion of the Court of Appeals (Appendix, pp. 10-18) is reported at 234 F.2d 157.

JURISDICTION

Jurisdiction of the District Court was based on diversity of citizenship and amount in controversy under United States Code, Title 28, Section 1332. Jurisdiction of the Court of Appeals was based on United States Code, Title 28, Section 1291. Jurisdiction of this Court is invoked under United States Code, Title 28, Section 1254(1).

The judgment of the Court of Appeals was made and entered on May 24, 1956 (Appendix, p. 19). The normal time to apply for the writ of certiorari expired on August 22, 1956, as provided in United States Code, Title 28, Section 2101(c). By order of the Honorable Harold H. Burton, Associate Justice, petitioner was given until October 5, 1956 in which to file this petition.

QUESTIONS PRESENTED

1. Where the place of residence is a jurisdictional requirement for the proper probate of an estate, and where the trial court made no findings as to the place of residence, is it not improper for the reviewing court to determine the place of residence *de novo* without application of the law of the state in which the action arose?

2. Did not the trial court err as a matter of law in deciding that intent to defraud is an essential element for equitable relief from an erroneous judgment?

3. Where a trial court, in deciding that actionable fraud requires intent to defraud, erred as a matter of law, should not a reviewing court reverse the judgment of the trial court with instructions to determine the other issues rather than to affirm the judgment of the trial court upon considerations (e. g. residence, title, and statutes of limitation) not determined by the trial court?

4. Where the trial court refused to pass upon certain affirmative defenses and where the defenses were neither briefed nor argued on review, is it not an injustice for a reviewing court to decide a case in part upon such considerations?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, § 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. * * *"

California Probate Code, Section 301:

> "* * * letters * * * of administration (must be) granted and administration of estates of decedents (must be) had, in the superior court: (1) Of the county of which decedent was a resident at the time of his death, wherever he may have died; * * *"

California Government Code, Section 244:

> "In determining the place of residence the following rules are to be observed: (a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose. (b) There can only be one residence. (c) A residence can not be lost until another is

gained. * * * (g) The residence can be changed only by the union of act and intent."

California Civil Code, Section 2224:

"One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

STATEMENT OF THE CASE

This case involves a promissory note, executed in California (Finding 5, Appendix, p. 2). Petitioner is the present holder of the note (Plaintiff's exhibit 1, R. 35-36, 47). Respondent is the personal representative of the maker, now deceased, of the note (Finding 13, Appendix, p. 5).

The District Court found that Edward Cebrian, the maker, owed the amount of said note, plus interest, at the time of his death (Finding 10, Appendix, p. 4).

The Court of Appeals found, in its opinion, that the original plaintiff (for whom petitioner was later substituted) brought suit in the United States District Court on the note against the personal representative of the deceased maker of the note. Plaintiff claimed that Edward Cebrian, the maker of the note, was a resident of Los Angeles County at the date of his death, that respondent fraudulently probated the decedent's estate in the City and County of San Francisco rather than in Los Angeles County and that as a consequence plaintiff was fraudulently deprived of the right to file a claim against the estate for the recovery of the amount due under the note (Opinion, Appendix, pp. 10-11).

The Court of Appeals found, but the District Court did not find, that the decedent at the time of his death was a

resident of the City and County of San Francisco. As a consequence of its finding, the Court of Appeals concluded that your petitioner failed to establish fraud (Opinion, Appendix, pp. 14-16).

The District Court made no finding as to the place where the decedent was a resident at the date of his death, but the District Court found in respondent's favor because "* * * defendant * * * committed no fraud extrinsic in character with respect to the probate proceedings * * *" (Appendix, p. 1), and "* * * no act of appellee in connection with the probate of the estate of Edward Cebrian was done with intent to deceive, defraud, delay, or mislead creditors. * * *" (Opinion, Appendix, p. 13).

Moreover, as the Court of Appeals pointed out in its decision, the District Court made no findings of fact or conclusions of law upon any other issues raised by the respondent in defense of the suit, including those based upon statutes of limitations and upon petitioner's alleged failure to establish title to the promissory note in suit (Opinion, Appendix, p. 13). The Court of Appeals on the other hand devoted much of its opinion to these affirmative defenses (Opinion, Appendix, pp. 16-18). Petitioner shows, this petition, p. 15, that these defenses were neither briefed nor argued before the Court of Appeals.

Since the two courts relied upon separate bases, petitioner submits that the rule that this Court will not review concurrent findings of fact is inapplicable.

The evidence on the question of place of residence is without conflict. The documentary evidence and the admissions of the parties disclose:

a. Edward Cebrian, petitioner admits, was established as a resident of the City and County of San Francisco from his birth until late 1934 or early 1935;

b. In 1935 Edward Cebrian moved to Rancho Cuyama, an old family ranch, near Santa Barbara, then under foreclosure and he lived there until 1938 under a lease with an option to purchase (R. 39, 40, 58, 97, and 98);

c. While Edward Cebrian was living at Rancho Cuyama, his father died in 1935 and devised the old family homestead in San Francisco to Edward's brother Ralph (R. 40, 53);

d. Edward Cebrian on July 13, 1936 became a registered voter in Santa Barbara County (R. 38, Plaintiff's Exhibit 6)—there is no evidence that this change in residence from San Francisco to Santa Barbara County was not voluntary;

e. Ralph Cebrian on May 27, 1937 transferred the family homestead to Louis De L. Cebrian (R. 41, Plaintiff's Exhibit 9);

f. In 1938, Edward Cebrian lost his rights in Rancho Cuyama (R. 59, 98)—Respondent admitted that this was after Ralph had disposed of the family homestead (R. 41);

g. In the interim, between 1935 and 1938, Edward made occasional "business trips" to San Francisco, where he stayed at the Palace Hotel (R. 97-98);

h. In 1938, during a visit to San Francisco, Edward met his brother Ralph on the street in San Francisco, Edward told Ralph that he wanted to remain in San Francisco but that respondent wanted him to move to Los Angeles (R. 55-56)—the record discloses no act at this time changing his residence from Cuyama to San Francisco;

i. Edward Cebrian admittedly left the Rancho Cuyama for Los Angeles (R. 41, 98);

j. In the fall of 1938, Edward Cebrian admittedly established his "first residence down there" (R. 100);

k. On October 1, 1939, Edward Cebrian moved into another apartment in Los Angeles and by stipulated testimony he told his landlady that it was his intention to become a "permanent" tenant and to make the apartment his "permanent home", he moved in with all of his personal belongings, and he stayed there until he died (R. 42, Plaintiff's Exhibit 10);

l. On March 20, 1940, Edward Cebrian under oath stated in his affidavit of registration that he was a "resident" of Los Angeles and that he removed from Cuyama (Plaintiff's Exhibit 11, R. 42-43);

m. Edward Cebrian thereafter voted in Los Angeles at the general elections in 1940 and 1942 (Plaintiff's Exhibit 11, R. 42);

n. Edward was never seen in San Francisco since 1938 (R. 55) and he did not even write to his brother Ralph (R. 56) although he did write to respondent (R. 101);

o. It is admitted that while in Los Angeles, Edward Cebrian stated to respondent and her husband that "he wanted *to return to San Francisco and make his residence here*" and "he wanted *to make San Francisco his home*," (R. 102, 104, emphasis added) thereby confirming his status that his residence was not then in San Francisco;

p. On June 6, 1944, Edward Cebrian died in Los Angeles;

q. Repondent, as informant to the death certificate of the decedent, admitted shortly after his death that "the usual residence" of the decedent was in Los Angeles County (Plaintiff's Exhibit 12, R. 43);

r. Respondent filed a verified petition for probate of the estate of Edward Cebrian in Los Angeles County

proclaiming under oath that Edward Cebrian was "a resident of the County of Los Angeles, State of California, at the time of his death" (Plantiff's Exhibit 13, R. 43).

The foregoing facts are incontrovertible upon the record. Petitioner urges that they prove that Edward Cebrian was a resident of Los Angeles at the date of his death. Any other conclusion of necessity would mean:

a. that Edward lied to his landlady when he told her of his intention to make the apartment a permanent home;

b. that Edward perjured himself when he sought voting registration in Santa Barbara and later in Los Angeles County;

c. that Edward committed misdemeanors when he voted at the general elections in Los Angeles;

d. that Edward spoke without meaning when he expressed the wish "to make" San Francisco his residence;

e. that respondent's husband was in error when he spoke of Edward's "first residence" in Los Angeles;

f. that respondent committed a misdemeanor when she was informant on the death certificate (Health and Safety Code, Section 10,675);

g. that respondent perjured herself when she verified the Los Angeles petition (Penal Code, Section 125).

We cannot conceive that errors could have been made at so many different times by so many different people concerning the place of residence of Edward, particularly when many of them were by the decedent himself and many of them would have constituted violations of law.

The Court of Appeals, without citation of any authority, cast the evidence outlined above aside, stating, Appendix, p. 16:

> "* * * Evidence of his registration and voting in Los Angeles and statements made while there are of little importance compared to the evidence upon which the Superior Court in San Francisco based its finding that he was a resident of the City and County of San Francisco at the time of his death; * * *"

Respondent admitted that the evidence upon which the Superior Court based its finding is as follows (R. 48-49):

> "Q. * * * What did you tell Judge Fitzpatrick about the proceedings you had filed down in Los Angeles?
>
> A. I told him I had filed them in Los Angeles so that the court would decide which was his residence.
>
> Q. Now, what were all of the facts that you told Judge Fitzpatrick to help him reach a decision?
>
> A. That he was born here in San Francisco; he went to school here in San Francisco, and then he went abroad also to [26] school, but his first schooling he started here. When he came back to America he went to Berkeley to the University, and his family home was here; he always wanted to live here; he would take trips as we all did, and he would always come back home, and that this was his home. He was living temporarily in Los Angeles, because he was able to find a job in Los Angeles, whereas here he had not been able to find one. So I left it to the court to decide.
>
> Q. And that's the sum and substance of what you told Judge Fitzpatrick?
>
> A. That's about it.
>
> Q. Can you think of anything else that you told him?
>
> A. Not at this moment I don't."

It is self-evident that respondent did not tell Judge Fitzpatrick all of the facts and that the facts which she did tell him presented a distorted picture upon which to determine residence.

REASONS FOR GRANTING THE WRIT

1. In determining the place of residence of Edward Cebrian, the Court of Appeals decided an important question of state law in a way in conflict with applicable state law.

The refusal of the Court of Appeals to give any weight to the evidence of Edward Cebrian's registration and voting in Los Angeles and to the statements made by him while there is in direct conflict with controlling California decisions.

For example, in *Bullis v. Staniford* (1918), 178 Cal. 40, the Court discussed the place of residence in proceedings to set aside a fraudulently declared homestead. Staniford lived at Fresno until 1912. In 1912 he went to Los Angeles; he registered as a voter in Los Angeles; and he voted at all regular elections in that city. The Court pointed out that his registration was supported by affidavits solemnly alleging that his residence was in Los Angeles. He also testified in a court action that his residence was in that city. The Court disposed of contrary evidence similar to that in the case at bar as follows, p. 46:

> "* * * At most his testimony amounts to proof of a floating intention some day to return to Fresno to live, and this as against the solemn, undisputed evidence of facts establishing his residence in Los Angeles is negligible."

And in *Estate of Brady* (1918), 177 Cal. 537, states, p. 540:

> "* * * The presumption that a person is innocent of crime is very strong, and it is not to be assumed, in the absence of substantial evidence of the fact, that Brady

committed perjury in making his affidavits of registration. The fact that his original place of residence was San Francisco is of no force to raise the presumption that it continued to be there after the year 1914, as against the positive evidence that in that year he deliberately changed it to the city of Ross. * * *"

Other cases in accord include:

Taff v. Goodman (1940), 41 Cal. App. 2d 771, 775;
Estate of Weed (1898), 120 Cal. 634; and
Estate of Margaret Austin (1879), Myrick, 237.

Under the Statute also, Government Code, Section 244, quoted this petition, p. 3, it is clear that Edward Cebrian's residence was never in San Francisco after he established residence at Rancho Cuyama in 1935 or 1936.

The rule in California appears to be sound, but, even if it were not, the Court of Appeals should have applied the California law. In *Krauss v. Greenbarg* (C.C.A. 3, 1943), 137 F.2d 569, the Court said p. 571:

"* * * our duty is to apply state law as we find it in the state decisions irrespective of what we may regard as its merits. * * *"

Petitioner urges that the failure to apply the state law of California on the contested issue of place of residence is a grave injustice which should be rectified by the grant of the writ. As an example of the use of the writ where the court made an independent determination of the law without citing or discussing state decisions or statutes, petitioner refers to *Klaxon Co. v. Stentor Co.* (1941), 313 U.S. 487, in which the Court said, p. 496:

"* * * Application of the New York statute apparently followed from the court's independent determination of the 'better view' without regard to Delaware law, for no Delaware decision or statute was cited or discussed."

Analogous authority warranting the grant of the writ is *Pecheur Co. v. Nat. Candy Co.* (1941), 314 U.S. 603, decree vacated and cause remanded (1942), 315 U.S. 666.

2. In the event that this Court agrees with petitioner that the question of residence was improperly decided, then the decision of the Court of Appeals and the District Court may be in direct conflict with *Markham v. Allen* (1946), 326 U.S. 490, and *Arrowsmith v. Gleason* (1889), 129 U.S. 86.

In the event that Edward Cebrian was a resident of the County of Los Angeles at the date of his death, as petitioner contends, it follows as the day follows the night that the prosecution of probate proceedings in the City and County of San Francisco instead of in the County of Los Angeles was a violation of the jurisdictional provision of the California Probate Code, § 301, quoted above, p. 3.

Petitioner concedes that, upon the allegations of the complaint in this case, the District Court had no authority to set aside the decree of the Superior Court for the City and County of San Francisco in appointing the respondent as the administratrix of the decedent's estate. Nonetheless, assuming petitioner's factual premise to be correct, petitioner submits that the District Court and the Court of Appeals both had the power and the duty to charge the respondent as a constructive trustee of the assets of the estate of the decedent for the creditors.

In *Markham*, the Court said, 326 U.S. 490, p. 494:

> "* * * it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. * * *"

In *Arrowsmith*, the Court said, 129 U.S. 86, p. 101:

> "These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As this case is within the equity jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion."

The rule of *Arrowsmith* has been adopted in *Curtis v. Schell* (1900), 129 Cal. 208, at p. 218, and in *Campbell-Kawannanakoa v. Campbell* (1907), 152 Cal. 201, at p. 210.

The equitable doctrine applied in *Markham* and *Arrowsmith* is part and parcel of the organic law of the State of California, as provided in the California Civil Code, § 2224, quoted above, p. 4. It is also applied with consistency and regularity in almost any kind of a case in which any kind of a litigant has obtained the benefits of any kind of a judgment to which he is not in equity entitled. A chart of California cases sustaining this categorical statement follows the appendix to this petition.

Petitioner submits that the failure of the District Court and the Court of Appeals to apply this equitable doctrine has resulted in unjust enrichment to the respondent, the District Court having found as a fact that Edward Cebrian owed the amount of the note on the date of his death (Find-

ing 10, Appendix, p. 4) and it being admitted that respondent shared in the estate as an heir and creditor (R. 113-115).

Petitioner further submits that the refusal of the Court to follow general principles of equity in this regard should be rectified by the grant of certiorari as was the case by analogy in *Markham v. Allen* (1946), 326 U.S. 490.

3. Insofar as the decision of the Court of Appeals might be thought to have an independent basis for support because of the determination of the District Court that respondent had no "intent to deceive, defraud, delay, or mislead creditors," the decisions below are in conflict with state law on this important question of state law. In *Cardozo v. Bank of America* (1953), 116 C.A. 2d 833, the Court held that a party is entitled to equitable relief on the basis of constructive fraud even where there is an absence of intent. At page 839, the Court said:

> "* * * The fact that she did not intend to defraud him is not important. He was just as defrauded as if she had intended to defraud him. * * *"

4. With respect to the issues decided by the Court of Appeals in the last three full paragraphs of the opinion (Appendix, pp. 16-18), the District Court made no finding of fact.

We note specifically that the District Court found, Conclusion VI, Appendix 9:

> "The Court, having disposed of the case in favor of defendant by express findings of fact and conclusions of law on the issue of fraud, makes no findings of fact or conclusions of law on the issues as to the interpretation of the note in suit, the questions of conflicts of laws or the other issues raised by defendant's special defenses based upon laches and various statutes of limitation of the States of California and Kentucky."

The briefs filed with the Clerk show that the issues were not even briefed in the Court of Appeals. Respondent noted her points on the issues not in her brief or argument but in a 37-page appendix annexed to a 72-page brief. Appellant's Reply Brief, on file with the Clerk of this Court, makes the following comment, p. 1:

> "Preliminarily, plaintiff points out that the Appellee's Reply Brief, pages 2-3, refers to several 'special defenses' upon which the District Court made no ruling. Defendant's argument on the special defenses is not made a part of the reply brief itself, but is included in a 37 page appendix following a 72 page brief. The rules do not appear to encompass an argument contained in an appendix.
>
> "Plaintiff submits, therefore, that the special defenses should be decided in the first instance by the District Court on remand if plaintiff is successful on the main issues. It is so suggested in Appellant's Opening Brief, page 61. If, however, this Court desires to decide the special defenses, plaintiff asks leave to file a reply brief directed to the argument in the appendix."

Petitioner notes that the Rules of the Court of Appeals for the Ninth Circuit do not provide for any argument to be included in an appendix. Petitioner also notes that the rules preclude a brief in excess of 80 pages "except after leave granted." Rule 18, Section 2(e).

In *Petitions of Rudder* (C.C.A. 2, 1947), 159 F.2d 695, the Court, in speaking of material which should have been printed in the record rather than in the brief, said, page 696:

> "* * * Since the material printed in the appendices has not been incorporated into the records on appeal, we shall not consider it in determining the merits of the appeals."

Counsel for petitioner has understood the rule to be that matters open to review are limited to the presentation of matters "as stated in the brief" (*Anderson v. Federal Cartridge Corporation*, C.C.A. 8, 1946, 156 F.2d 681, 683) and that the rules on briefs are construed so as to require strict compliance thereto (*Thys Company v. Anglo California National Bank*, C. A. 9, 1955, 219 F.2d 131, 132-133). Cf. *Clark Blade & Razor Co. v. Gillette Safety Razor Co.*, C.C.A. 3, 1936, 82 F.2d 707, 708, and *Ind. Wireless Co. v. Radio Corp.* (1926), 270 U.S. 84, 86.

Petitioner submits that in basing a decision, even in part, on matters neither briefed nor argued, the decision has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Petitioner submits that her objection to this procedure is a meritorious one. In the *first* place, the Court of Appeals criticized her husband's acquisition of the note in question. If this matter had been briefed and argued, petitioner would have been able to call the attention of the Court of Appeals to the fact that the note was payable to John S. Barbee (Finding 5, Appendix, pp. 2-3); that John S. Barbee endorsed the note in blank (Finding 6, Appendix, p. 3); that John S. Barbee delivered the note to Van Meter-Terrell Feed Company (Finding 6, Appendix, p. 3); that the note in turn had been endorsed to Mr. Van Meter (Defendant's Exhibit A, p. 14); that First National Bank & Trust Company of Lexington, Kentucky, the executor and trustee of the estate of Baylor Van Meter, not only delivered the note to Mr. Colville, but also executed an assignment of the note to Mr. Colville (Findings 7 and 8, Appendix, pp. 3-4, Plaintiff's Exhibits 17 and 17-A); and that the petitioner produced the note so endorsed in blank at the trial of the case (R. 35-

37, 47). Petitioner also would have been able to show that Mr. Colville paid the First National Bank & Trust Company the sum of $500 in cash and agreed in addition to pay the Bank "50 percent of the net amount" collected by him in excess of $500 (Plaintiff's Exhibit 17-A, R. 44). As a consequence, the estate of Baylor Van Meter, the former owner of the note, is the beneficiary of 50% of the recovery.

Petitioner thus would have been able to show to the Court that the situation was quite unlike *Cockerell v. Title Ins. & Trust Co.*, 42 C.2d 284, 267 P.2d 16, in which the note in suit was made payable to "Crestmore Co., a Limited Partnership," and in which the note was specially endorsed "The Crestmore Co. P. H. Wierman."

In the *second* place, the Court of Appeals, without the benefit of argument, found that the appellant's suit was barred by the statute of limitations "unless it contained a waiver of the statute of limitations. There was no such waiver in the note in suit" (Appendix, p. 18). If this matter had been briefed and argued and if it were before the Court for decision, petitioner would have been able to show to the Court of Appeals that the note contained the following language:

> "* * * The makers and endorsers of this note and all parties hereto waive * * * diligence in bringing suit against any and all parties hereto, including makers and endorsers, and all defenses to the payment thereof, * * *" (Finding 5, Appendix 3).

Petitioner then also would have been able to show that under the law of the State of California, where the note was made, that the quoted language constituted a waiver of the statutes of limitations under cases such as *State Loan Etc. Co. v. Cochran* (1900), 130 Cal. 245; *Atlas Finance Corp. v. Kenny* (1945), 68 C.A. 2d 504; *Brownrigg v. DeFrees*

(1925), 196 Cal. 534; *McGee v. Jones* (1926), 79 Cal. App. 403; *Hammell v. Atkinson* (1926), 79 Cal. App. 708; and *Dexter v. Pierson* (1931), 214 Cal. 247.

Under the circumstances, petitioner submits that a grave injustice was committed when the Court of Appeals ruled *sua sponte* and without the benefit of briefing and argument upon these issues. Petitioner submits that a case should not be decided even in part upon the basis of an argument slipped into the case in an appendix to a brief particularly when the appendix is unwarranted by the rules of court and is unauthorized by court order.

CONCLUSION

Petitioner prays that the writ of certiorari issue.

Respectfully submitted,

CARL HOPPE
Attorney for Petitioner

(Appendix Follows)

Appendix

[Title of District Court and Cause.]

ORDER FOR JUDGMENT IN FAVOR OF DEFENDANT

This matter having been tried, briefed and submitted for decision,

The Court finds: That defendant-executrix, Isabelle C. Koch, committed no fraud extrinsic in character with respect to the probate proceedings involving the late Edward Cebrian. That there is no basis in law or in fact for directing the establishment of a constructive trust against said defendant and in favor of plaintiff, Wilma Urch Colville.

In view of the Court's specific finding on the issue of fraud, there is no occasion to pass upon the applicability of the statute of limitations or the defense of laches.

Accordingly, It is Ordered that judgment be entered in favor of defendant upon preparation of findings of fact and conclusions of law. Each side shall bear its own costs.

Dated: November 9, 1954.

/s/ George B. Harris,
United States District Judge.

[Endorsed]: Filed November 10, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 9th day of March, 1954, and continuing to and including the 11th day of March, 1954, before the Court, Honorable George B.

Harris, United States District Judge, presiding, jury having been duly waived by the parties, Carl Hoppe, Esq., and Charles E. Townsend, Jr., Esq., appearing as attorneys for plaintiff, and Charles D. Sooy, Esq., appearing as attorney for defendant, and from the evidence introduced the Court finds the facts, as follows, to wit:

1. That Charles J. Colville, the original plaintiff herein, was at all times prior to his death a citizen of the Dominion of Canada, and that plaintiff by substitution, Wilma Urch Colville, is the widow, and executrix of the estate of Charles J. Colville, deceased, the original plaintiff herein;

2. That defendant is a citizen of the State of California;

3. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00);

4. That on November 15, 1932, one Edward Cebrian, now deceased, executed and delivered to the agents and attorneys of one John S. Barbee, or his assignee, Van Meter Terrell Feed Company, a Kentucky Corporation, a promissory note dated November 15, 1932, whereby Edward Cebrian promised to pay to John S. Barbee, or his order, the sum of $10,276.92 with interest at six per cent per annum from date until paid, payable six months after the date thereof at 200 Trust Building, Lexington, Kentucky;

5. That a full, true and correct copy of the promissory note is as follows:

$10,276.92——

San Francisco, California, November 15, 1932.

Six Months After Date, for value received, I promise to pay to the order of John S. Barbee, of Lexington, Kentucky, the sum of Ten Thousand, Two Hundred Seventy-six and 92/100 dollars ($10,276.92), with interest at the rate of six

per cent, per annum from date until paid, without defalcation, interest payable at maturity, and thereafter semi-annually until paid in full, this note negotiable and payable at 200 Trust Building, Lexington, Kentucky. The makers and endorsers of this note and all parties hereto waive presentment thereof for payment, notice of non-payment, protest and notice of protest and dishonor, and diligence in bringing suit against any and all parties hereto, including makers and endorsers, and all defenses to the payment thereof, and I guarantee payment thereof in the hands of bona fide holders.

/s/ EDWARD CEBRIAN.

6. That said promissory note dated November 15, 1932, was executed and delivered in renewal of an earlier promissory note from Edward Cebrian to John S. Barbee made in 1928 in Kentucky, which earlier note John S. Barbee had assigned to Van Meter Terrell Feed Company, a Kentucky Corporation, as collateral security for a debt owed by John S. Barbee to said corporation. Upon receipt in November, 1932, of the renewal note dated November 15, 1932, from Edward Cebrian to John S. Barbee, John S. Barbee endorsed said note in blank and delivered it to Van Meter Terrell Feed Company, a Kentucky Corporation;

7. That on or about June 6, 1945, Baylor Van-Meter sole owner of the said Van Meter Terrell Feed Company, a Kentucky Corporation, died at Lexington, Kentucky. On or about June 16, 1945, First National Bank and Trust Company of Lexington, Kentucky, was duly appointed executor of his estate, and on or about August 24, 1945, First National Bank and Trust Company of Lexington, Kentucky, was duly appointed trustee of the estate of Baylor Van-Meter, deceased;

8. That on or about May 24, 1950, said First National Bank and Trust Company of Lexington, Kentucky, delivered said note to Charles J. Colville, original plaintiff herein, and assigned to said Charles J. Colville all right, title, claim and interest it held in and to said promissory note dated November 15, 1932, from Edward Cebrian to John S. Barbee as executor or trustee of the estate of Baylor Van-Meter, deceased, or as both executor and trustee of said estate;

9. That Edward Cebrian died on or about June 6, 1944, in the County of Los Angeles, State of California;

10. That at the time of his death, Edward Cebrian owed to John S. Barbee, Van Meter Terrell Feed Company, a Kentucky Corporation, or the assignee or assignees or successors of said John S. Barbee or said Corporation, the said note dated November 15, 1932, plus simple interest from said date at six per cent (6%) per annum;

11. That the Superior Court of the State of California, in and for the City and County of San Francisco, held that Edward Cebrian was at the time of his death a resident of the City and County of San Francisco, State of California, having lived most of his life in the Cebrian family home in San Francisco, although he died in the County of Los Angeles, where he had been living for about six (6) years because of his reduced financial circumstances and because of his opportunity for employment in Los Angeles County and for other reasons;

12. That on February 9, 1945, defendant executed a petition for letters of administration in the matter of the estate of Edward Cebrian, alias, deceased, and caused said petition to be filed on February 10, 1945, in the Superior Court of the State of California, in and for the City and County of San Francisco, probate proceeding No. 98563 therein. On February 11, 1945, defendant caused notice of the hearing

of said petition for letters of administration filed in San Francisco, to be given for the time and in the manner required by law and Section 441 of the Probate Code of the State of California. In her said petition for letters of administration, defendant alleged that Edward Cebrian had died in the County of Los Angeles, State of California, but that he was at the time of his death a resident of the City and County of San Francisco, State of California;

13. That on February 20, 1945, after filing a petition for letters of administration in the Superior Court of the State of California, in and for the City and County of San Francisco, and before any hearing was had upon said petition, defendant filed a petition for letters of administration in the Superior Court of the State of California, in and for the County of Los Angeles. Defendant caused notice of the hearing of said Los Angeles petition to be given in the manner and for the time required by law and by Section 441 of the Probate Code of California. The defendant's only reason for filing said petition in Los Angeles County was to avoid delay in the event the San Francisco Superior Court should decide that Edward Cebrian was a resident of the County of Los Angeles, rather than of the City and County of San Francisco, as she alleged, and if so, it would necessarily follow that it would have decided it had no jurisdiction to appoint defendant as administratrix. In this event, defendant then could and would have proceeded with the probate proceedings instituted by her in Los Angeles County solely to meet that contingency. However, on February 26, 1945, the San Francisco Superior Court determined that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death and appointed defendant as his administratrix. Accordingly, defendant abandoned the Los Angeles proceeding;

14. At no time subsequent to the death of Edward Cebrian did defendant, as an individual or as administratrix of his estate, inter-meddle with the proper probate of the estate of Edward Cebrian, deceased, either wrongfully or fraudulently;

15. That at no time subsequent to the death of Edward Cebrian, did defendant conceal, fraudulently or otherwise, the existence of the assets of the said Edward Cebrian; defendant has inventoried and accounted for all of the assets of the Edward Cebrian estate in the probate proceeding pending in the City and County of San Francisco; the allegations in the petition for letters of administration filed February 10, 1945, in the Superior Court in and for the City and County of San Francisco, as to the legal residence of Edward Cebrian at the time of his death were true and correct according to the best information and belief of defendant;

16. That no acts of defendant have deprived plaintiff, or her predecessors, of their right to file claims;

17. That on February 26, 1945, defendant, as administratrix of the estate of Edward Cebrian, alias, deceased, caused Notice to Creditors to be published in The Recorder, a newspaper of general circulation published in the City and County of San Francisco, State of California, in the matter of the estate of Edward Cebrian, alias, deceased, probate proceeding No. 98563, for the time and in the manner provided by law and Section 700 of the Probate Code of California; that the six-months period of time to file claims expired August 26, 1945; that no claim was ever filed or presented by plaintiff or any one else upon the promissory note of Edward Cebrian dated November 15, 1932, referred to in plaintiff's complaint, as required by the Probate Code of California;

18. That all of the facts alleged in plaintiff's Complaint inconsistent with the foregoing findings are untrue;

19. That all the facts alleged in defendant's Answer not inconsistent with the foregoing findings are true;

20. That no act of defendant in connection with the probate of the estate of Edward Cebrian was performed with any intent to deceive, delay, defraud, or mislead creditors of the estate of Edward Cebrian.

CONCLUSIONS OF LAW

As Conclusions of Law from the foregoing findings of fact the Court finds, as follows:

I.

That any suit or action to recover upon the promissory note dated November 15, 1932, made by Edward Cebrian in favor of John S. Barbee in the sum of $10,276.92, with interest, is forever barred by reason of the failure of the holder of said promissory note to file a creditor's claim in probate thereon within six months from the date of the first publication of Notice to Creditors on February 27, 1945, made in the matter of the estate of Edward Cebrian, alias, deceased, pending in the Superior Court of the State of California, in and for the City and County of San Francisco, probate file No. 98563 in the records thereof.

II.

That plaintiff and her predecessors in interest had constructive notice of the hearing on February 26, 1945, of the petition of defendant for letters of administration heard in the Superior Court of the State of California, in and for the City and County of San Francisco, by reason of the notice

of said hearing given by defendant in the manner and for the time required by law.

III.

That the Superior Court of the State of California, in and for the County of Los Angeles, never had or acquired jurisdiction of the matter of the estate of Edward Cebrian, alias, deceased, under the petition for letters of administration filed therein by defendant on February 20, 1945, by reason of the fact that the Superior Court of the State of California, in and for the City and County of San Francisco, in which the first petition for letters of administration was filed on February 10, 1945, had on February 26, 1945, determined that Edward Cebrian was a resident of the City and County of San Francisco, State of California, at the time of his death and that the jurisdiction to administer the estate of said decedent was in San Francisco Superior Court.

IV.

Defendant committed no fraud, extrinsic in character, with respect to the probate proceedings in the matter of the estate of Edward Cebrian, alias, deceased, either in the County of Los Angeles or the City and County of San Francisco, State of California.

V.

That plaintiff is not entitled by law or under the evidence adduced at the trial of this case to a judgment that defendant, either as administratrix of the estate of Edward Cebrian, alias, deceased, or as an individual, is a constructive trustee for plaintiff, Wilma Urch Colville.

VI.

The Court, having disposed of the case in favor of defendant by express findings of fact and conclusions of law on the issue of fraud, makes no findings of fact or conclusions of law on the issues as to the interpretation of the note in suit, the questions of conflicts of laws or the other issues raised by defendant's special defenses based upon laches and various statutes of limitation of the States of California and Kentucky.

VII.

That defendant is entitled to judgment that plaintiff take nothing by her complaint, provided, however, each party shall bear her own costs of suit. Let Judgment be entered accordingly.

Dated: February 14, 1955.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed February 14, 1955.

[Title of District Court and Cause]

JUDGMENT

This cause having come on regularly for trial on the 9th day of March, 1954, before the United States District Court, Honorable George B. Harris, District Judge, presiding, without a jury, a jury having been duly waived; Carl Hoppe, Esq., and Charles E. Townsend, Jr., Esq., appearing as attorneys for plaintiff, and Charles D. Sooy, Esq., appearing as attorney for defendant; and the Court having made its Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that plaintiff take nothing by her said complaint, and

It Is Ordered further that each party bear her own costs of suit incurred herein.

Dated: February 14, 1955.

/s/ GEORGE B. HARRIS,
United States District Judge.

Receipt of copy acknowledged.

Lodged November 18, 1954.

[Endorsed]: Filed February 14, 1955.

[Title of United States Court of Appeals for the Ninth Circuit and Cause]

Before: McAllister, Pope, and Chambers, Circuit Judges.

McAllister, Circuit Judge:

OPINION

Charles J. Colville brought suit in the district court on a promissory note against Isabelle C. Koch, administratrix of the estate of Edward Cebrian, deceased. The plaintiff claimed that he had been deprived, through the fraudulent probate of the estate by Mrs. Koch in San Francisco, of the right to file his claim, and that the fraud consisted in Mrs. Koch's representation that her brother had been a resident of San Francisco at the time of his death, whereas, in reality, he had been a resident of Los Angeles; and plaintiff, accordingly, claimed that the notices for the filing of claims should have been published in Los Angeles County instead of San Francisco, thereby causing him to fail to file his claim. During the litigation, Mr. Colville died, and his wife,

Wilma Urch Colville, as his executrix, was substituted as party-plaintiff. The district court denied recovery on the note, and Mrs. Colville, as executrix, appeals.

The background of the case is as follows: On November 15, 1932, Edward Cebrian executed a promissory note in the amount of $10,276.92, with interest at 6%, payable six months thereafter, to John S. Barbee or his order, at Lexington, Kentucky. The note was headed: "San Francisco, California."

Mr. Cebrian was born in San Francisco and lived in that city most of his life. He died in Los Angeles, June 6, 1944, at the age of sixty-two. As far as the evidence in this case discloses, no one had ever made a demand for payment of the above note until the filing of this suit, November 6, 1952, nearly twenty years after its execution, and nineteen and a half years after it became due; and no interest had ever been paid upon the note.

On February 9, 1945, Isabelle C. Koch, defendant-appellee, a sister of Mr. Cebrian, filed a petition for letters of administration of his estate in the Superior Court of the State of California in and for the County of San Francisco; and on February 11, 1945, she caused notice of the hearing of the petition to be given for the time and in the manner required by law. In her petition, she alleged that Mr. Cebrian had died in the County of Los Angeles, but that, at the time of his death, he was a resident of the City and County of San Francisco. Nine days after filing her petition in San Francisco, appellee administratrix also filed a petition for letters of administration in her brother's estate in the Superior Court of the State of California in and for the County of Los Angeles, alleging that at the time of his death, he was a resident of that city, and caused notice of the hearing of the Los Angeles petition to be given in the

manner and for the time required by law. Appellee filed the second petition in Los Angeles on advice of her counsel and for the reason, as she stated, that she did not know which place the court would consider to have been the legal residence of Mr. Cebrian.

The Superior Court in San Francisco determined that Edward Cebrian had been a resident of that city at the time of his death. Appellee administratrix thereupon proceeded to the probate of his estate in San Francisco and abandoned any further proceedings in Los Angeles.

In the suit upon the note brought by appellant's decedent, it was alleged that Edward Cebrian was a resident of Los Angeles at the time of his death; that Isabelle C. Koch, administratrix of Mr. Cebrian's estate, after filing her petition for letters of administration in Los Angeles, fraudulently represented that Mr. Cebrian had been a resident of San Francisco at the time of his death; that she fraudulently filed a petition for letters of administration in that county; that she fraudulently concealed the existence of new assets in her brother's estate; that she fraudulently intermeddled with the jurisdiction of the Los Angeles Superior Court and failed to deliver to the jurisdiction of that court assets of her brother's estate coming into her possession; that she fraudulently intermeddled with the proper probate of her brother's estate and wrongfully obtained and retained possession and control of all of his property; and that, by her false representations that Edward Cebrian had been a resident of San Francisco at the time of his death, she fraudulently caused the Superior Court of San Francisco to grant letters of administration to her and deprived plaintiff's decedent of knowledge of the existence of the assets of Edward Cebrian and of his right to file his claim against the estate.

The district court found that appellee's only reason for filing the petition in Los Angeles was to avoid delay in the event that the San Francisco Superior Court should decide that Edward Cebrian was a resident of Los Angeles, rather than of San Francisco, at the time of his death; that at no time did appellee intermeddle with the proper probate of the estate of her brother, wrongfully or fraudulently, nor fraudulently conceal the existence of assets of the estate; that no acts of appellee had deprived appellant or her predecessors of their right to file claims; that the probate of the estate in San Francisco was legal and proper; that all appellant's allegations in the complaint, inconsistent with the foregoing, were untrue; that no claim was ever filed on the promissory note and that no act of appellee in connection with the probate of the estate of Edward Cebrian was done with intent to deceive, defraud, delay, or mislead creditors. As a matter of law, the district court concluded that appellant and her predecessors in interest had constructive notice of the hearing in San Francisco on appellee's petition for letters of administration; that the claim on the promissory note was forever barred for failure to file claim thereon in the probate proceedings; and that appellee had committed no fraud, extrinsic in character, with respect to the probate proceedings, either in Los Angeles or in San Francisco. The district court finally declared that, having disposed of the case in favor of appellee by express findings of fact and conclusions of law on the issue of fraud, it made no findings of fact or conclusions of law upon other issues raised by appellee in defense of the suit, including those based upon statutes of limitations, and appellant's failure to establish title to the promissory note in suit.

The judgment of the district court in this case may not be reversed unless its findings of fact were clearly erroneous,

or unless it committed reversible error as a matter of law, Rule 52 of the Federal Rules of Civil Procedure; and in determining whether the findings of the trial court in the instant case were clearly erroneous, we arrive at a consideration of the evidence.

Edward Cebrian, as has been mentioned, was born in San Francisco. His family was an old family of California, of Spanish descent. His parents, and he and his brothers and sisters, as children, lived in the homestead in San Francisco, a great house of twenty rooms or more. Their life together was intimate. They celebrated together, in San Francisco, the feast days of the great Spanish saints; and several of the members of the family continued to live in the old home even in their later years. When the various members of the family were not in San Francisco, they spent much of their time in Europe, especially in Spain. Mr. Cebrian was educated, first, in San Francisco, and afterward, in Europe, returning eventually to finish his education at the University of California at Berkeley. In 1935, Mr. Cebrian's father died while staying in Madrid. His mother had died in 1920. Among other properties his father owned was the Cuyana Rancho, an historic Spanish ranch of more than 44,000 acres, coming down to the family from an ancient grant, and located in Santa Barbara and San Luis Obispo Counties. In 1932, his father gave the Cuyana Rancho to his four sons. The old home in San Francisco was bequeathed by his father to Ralph Cebrian, a brother of Edward. At that time, the two brothers were living in the home. The other children had married and moved away. After the father had given the Cuyana Rancho to his sons, it was operated by Ralph and Edward. Ralph spent most of his time in their office in San Francisco. Edward lived on the ranch from time to time, as well as in Kentucky where he had entered into the

business of breeding horses. Shortly after the father's death, Ralph was obliged to sell the family home in satisfaction of a debt. The Cuyana Rancho had, at some time not disclosed by the record, become mortgaged in the amount of $450,000. In 1938, the family lost title to the ranch. Edward Cebrian thereafter had a lease arrangement with the bank which had foreclosed the mortgage, and attempted to raise money to regain the title, but after many efforts, was unsuccessful. In the same year of 1938, Ralph, after selling the home in San Francisco, moved out, and a few days later, Edward also left the family home for good. Ralph went to a small apartment, and Edward, to the Palace Hotel; but eventually, he ran out of funds. His sister, appellee administratrix in this case, told him that if he would arrange to go to Los Angeles, he could find a less expensive place to live than in San Francisco, and that she would do her best to help him as much as she could. On the hearing, his sister testified that in San Francisco, he was greatly entertained by his friends and would wish to reciprocate, but that she could not afford to keep him living in the manner to which he had always been accustomed. Edward finally took her advice and went to Los Angeles. His sister contributed $200 a month to him for his support, as well as assisted in his clothing bills. He eventually secured employment as a translator in Los Angeles; but she continued thereafter contributing the same payments to him as before.

It is clear from the evidence that Edward Cebrian never wanted to leave San Francisco to go to Los Angeles. But when the old family home in San Francisco was sold, and the great Cuyana Rancho was gone, he was reduced to the meager pay of a translator, working in a place where rent was cheap, where he had no friends, and where he lived in a rooming house upon the bounty of his sister who gave him

what she could. Yet he never gave up the hope of going back among his early friends to his boyhood home of San Francisco. Whenever any of his relatives who had been visiting him in Los Angeles were about to depart for San Francisco, he was ready, at a moment's notice, to leave Los Angeles for good; if it had been possible for him to secure living quarters in San Francisco and sufficient income to live in that city, there is no doubt that he would have returned at once; and he continued to plead with his relatives to do everything they could to make this come to pass. The proofs show that he always considered San Francisco as his home. Evidence of his registration and voting in Los Angeles and statements made while there are of little importance compared to the evidence upon which the Superior Court in San Francisco based its finding that he was a resident of the City and County of San Francisco at the time of his death; and in our view, appellant has entirely failed to prove that Isabelle C. Koch, his sister and the administratrix of his estate, was guilty of fraud of any kind or degree in the probate proceedings or in the management of the estate.

It is of interest, in this case, to find how Mr. Colville, appellant's decedent who brought suit upon the note, came into its possession. It appears that through a mutual acquaintance of Colville and members of the Cebrian family, Colville was introduced to Ralph Cebrian, and on another occasion, to Mrs. Koch, appellee administratrix, and her husband. Without any introduction to the matter, Colville declared that he was "a searcher of records; that he had acquired the note in question in this case; that he had further, procured photostatic copies of documents in many legal proceedings in which Edward Cebrian had been a party. He said: "I go into estates and see if I can find any flaws in them in order that I might turn them over to my

own personal gain." He said that he knew all about the probate proceedings filed in Los Angeles by Mrs. Koch; that he knew of judgments entered against Edward Cebrian; that he had found that oil was discovered on the Cuyana Rancho —apparently after the Cebrians lost it—and that the Richfield Oil Company had taken approximately one hundred million dollars out of this property; that he had been "looking for quail but had found much bigger game"; and that he was going to use the note of Edward Cebrian to reopen past legal proceedings and overturn former adjudications for the benefit of his own pocket. He further declared to Ralph Cebrian and to Mrs. Koch and her husband that even if they wanted to pay the note in full, he would refuse any proposition—although they had not in any way intimated that they were in the slightest degree interested in buying up the note. At that time, the amount due on the note, with interest thereon, aggregated more than $21,000; and Colville stated that he had picked up the note from a bank in Kentucky for only $500. It does not appear, other than by his statement to Edward Cebrian's relatives, whether he ever paid anything for the note. The circumstances are not directly relevant, but indicate where the equities lie as between the parties to this suit.

Appellant administratrix claims that her decedent acquired the note in question from the personal representative of an assignee of an assignee of the original payee, John Barbee. The assignee of the payee was a corporation, the Van Meter-Terrell Feed Company. Appellant claims title from the personal representative of Baylor Van Meter. To prove a chain to appellant, she must show that there was a transfer to Baylor Van Meter. Otherwise, the title to the note, as far as the evidence in this case goes, would still be in the corporation, the Van Meter-Terrell Feed Company.

There is no proof of assignment or transfer of the note from the above named corporation to Van Meter, nor is there any proof that Van Meter was the sole owner of the corporation. Appellant has pleaded that the corporation acquired the note from the original payee. Appellee denied, in her answer, that Van Meter ever acquired the note from the corporation. Because of appellee's denial, the burden of proving the assignment from the corporation to Van Meter was on appellant; and she failed to establish such assignment and title to the note. See *Cockerell v. Title Insurance & Trust Co.*, 42 Cal. 2d 284, 267 P.2d 16.

In addition to the foregoing, it appears that appellant's suit is barred by the statute of limitations. Under Section 337(1) of the Code of Civil Procedure of California, any action in that state on the note payable on May 15, 1933, was barred four years thereafter, unless it contained a waiver of the statute of limitations. There was no such waiver in the note in suit. Action upon the note was not brought until subsequent to the expiration of the statute of limitations.

In accordance with the foregoing, the judgment of the district court is affirmed.

(Endorsed:) Opinion. Filed May 24, 1956.

PAUL P. O'BRIEN, *Clerk*.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed]: Judgment Filed and Entered: May 24, 1956.

PAUL P. O'BRIEN, *Clerk*.

NOV 3 1956
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 479

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,
Petitioner,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the Supreme Court
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No. 479

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,

Petitioner,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Respondent, Isabelle C. Koch, individually and as administratrix of the estate of Edward Cebrian, deceased, presents her brief in answer and opposition to the Petition for Writ of Certiorari filed herein by

Wilma Urch Colville, as executrix of the Estate of Charles J. Colville, deceased.

QUESTIONS PRESENTED.

1. Did the District Court fail to make findings as to the place of residence, as stated in the Petition? (Petition 2, question 1.)

2. Did the District Court decide as a matter of law that intent to defraud is an essential element for equitable relief from a judgment, as stated in the Petition? (Petition 2 and 3, questions 2 and 3.)

3. Were the special affirmative defenses (not decided by the District Court) briefed and argued on review to the Court of Appeals and thus properly presented and decided by the Court of Appeals as further supporting the judgment of the District Court? (Petition 3, question 4.)

4. Was the District Court (if it did not decide the alleged issue as to place of residence) precluded from examining this issue by the final judgment of the state probate Court under applicable California law?

5. Did the District Court err as a matter of law in finding and deciding that Respondent committed no fraud, extrinsic in character, with respect to the probate proceedings in the state Court?

6. Did the District Court and the Court of Appeals decide an important state question in a way in conflict with applicable state law?

7. Did the Court of Appeals (though not committing error) so far depart from the accepted and usual course of judicial proceedings as to call for the exercise by this Court of its power of supervision?

STATUTORY PROVISIONS INVOLVED.

California Probate Code:

"Section 302. Conclusiveness of Order Granting Letters: Exception. In the absence of fraud in its procurement, an order of the superior court granting letters, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based upon the erroneous assumption of death), and cannot be collaterally attacked."

"Section 441. Procedure Before Hearing. The clerk shall set the petition for hearing by the court and give notice thereof by causing a notice to be posted at the courthouse of the county where the petition is filed, giving the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing. The clerk shall cause similar notice to be mailed, postage prepaid, to the heirs of the decedent named in the petition, at least ten days before the hearing, addressed to them at their respective postoffice addresses, as set forth in the petition, otherwise at the county seat of the county where the proceedings are pending."

"Section 707. Claims on Contract for Funeral Expenses, Damages, and Under Section 575: Necessity of Filing Within Time Provided: Effect

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of Failure to File: Entry of Claims in Register. All claims arising upon contract, whether they are due, not due, or contingent, and all claims for funeral expenses and all claims for damages for physical injuries or death or injury to property or actions provided for in Section 574 of this code, must be filed or presented within the time limited in the notice or as extended by the provisions of Section 702 of this code; and any claim not so filed or presented is barred forever, unless it is made to appear by the affidavit of the claimant to the satisfaction of the court or a judge thereof that the claimant had not received notice, by reason of being out of the State, in which event it may be filed or presented at any time before a decree of distribution is rendered. The clerk must enter in the register every claim filed, giving the name of the claimant, the amount and character of the claim, the rate of interest, if any, and the date of filing."

"Section 708. Effect of Statute of Limitations. No claim which is barred by the statute of limitations shall be allowed or approved by the executor or administrator, or by the judge. When a claim is presented to a judge for his allowance or approval, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim. No claim which has been allowed is affected by the statute of limitations, pending the administration of the estate."

California Code of Civil Procedure.

"Section 335. Periods of Limitation Prescribed. The periods prescribed for the com-

mencement of actions other than for the recovery of real property, are as follows:"

"Section 337. (Within Four Years.) Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code; provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage."

"Section 338. (Within Three Years.) Within three years: 4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

"Section 361. Limitation Laws of Other States, Effect of. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued."

"Section 473. (Pleadings May Be Amended: Continuance: Relief From Judgment Taken By

Mistake, Inadvertence, Surprise, or Excusable Neglect: Correction of Clerical Mistakes in Judgments or Orders: Setting Aside Void Judgment or Order.) * * *

"*(Relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect.)* The court may upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken."

Civil Code of California.

"Section 1709. Fraudulent Deceit. One who wilfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damages which he thereby suffers."

SUMMARY OF ARGUMENT.

1. The District Court made findings as to the place of residence of Edward Cebrian when he died in 1944. (Appendix to Petition 6, Finding 15, Appendix 7, Finding 19.) Petitioner's main argument is based upon the erroneous assumption that the Court of Ap-

peals decided issues raised by pleadings, but on which the District Court failed to make any finding of fact.

2. The District Court, in finding that Respondent performed no act with intent to deceive, delay, defraud or mislead creditors of Edward Cebrian's estate, did not either (i) decide that such lack of intent was an indispensable element of Petitioner's cause of action, or (ii) place its finding against the existence of fraud upon this ground. However, in California, even if the District Court had stated that its finding that no actual fraud had been committed was based upon a lack of intent to deceive, such conclusion would have been based upon applicable California law.

Cohen v. Penn. Mutual Life Ins. Co. (1956), 144 A.C.A. 507 (301 Pac. 2d 253);
23 *Cal. Jur.* 2d 168, Sec. 67.

3. Respondent briefed and argued her affirmative defenses before the Court of Appeals. Although Petitioner filed a reply brief in the Court of Appeals on the fraud issue, she ignored Respondent's affirmative defenses and filed no brief as to them at any time. Both Respondent and Petitioner had filed written briefs and argued these special defenses before the District Court over a period of several years. Therefore, the issues of law raised by these affirmative defenses were properly presented to and decided by the Court of Appeals.

4. Petitioner and her predecessors were bound by the final judgment of the state probate court on the question of Edward Cebrian's residence in San Fran-

cisco when he died. Such judgment was conclusive in the absence of extrinsic fraud.

Estate of Crisler (1948), 83 Cal. App. 2d 431, 188 Pac. 2d 772;

Estate of Robinson (1942), 19 Cal. 2d 534, 121 Pac. 2d 734.

5. The findings of fact and conclusions of law on the lack of extrinsic fraud were amply supported by the evidence.

(A) The fact of Edward Cebrian's San Francisco residence was supported by evidence of his intent, through declarations and letters to his relatives, his actions, his maintaining a home in San Francisco from early boyhood until events beyond his control made this no longer possible. (Respondent's Deposition. Testimony in Record.)

(B) The fact of Edward Cebrian's San Francisco residence was determined for all purposes involved in this action by a final judgment of a court of general jurisdiction. (Appendix 8, Conclusion III.) Respondent did not mislead, misrepresent or deceive the Probate Court or any creditor. Respondent did nothing which prevented or had any effect upon the filing of a creditor's claim on the note in suit. (Appendix 6, Finding 16.)

6. The issues of law as to the effect of voting upon the question of legal domicile were decided in conformity with California law. Registration and voting are factors to be considered in determining the sub-

ject's intent as to his legal residence but they are not conclusive on the issue.

Estate of Spencer (1926), 198 Cal. 329, 245 Pac. 176;

Bradley v. Davis, 156 Cal. 267; 104 Pac. 302.

7. The length of Respondent's single brief, filed in the Court of Appeals, was one hundred nine (109) pages, including the argument on her special defenses. Petitioner's opening brief had cited fifty-eight (58) cases on the main fraud issue, plus numerous code sections and texts. A rule of the Court of Appeals limits briefs to eight (80) pages unless leave is granted to file a longer brief. No objection to the length of Respondent's brief was made in the Court of Appeals by Petitioner, the Clerk or the Court. No petition for rehearing was filed by Petitioner. In the absence of objection below, the length of Respondent's brief does not justify the issuance of a Writ of Certiorari.

STATEMENT OF THE CASE.

Edward Cebrian made a promissory note for $10,276.92 dated November 15, 1932, which was payable in Lexington, Kentucky, on May 15, 1933, over nineteen years before this action was commenced. *(Appendix 2, Finding 5.) Edward Cebrian died in 1944 and on February 26, 1945 Respondent was appointed administratrix of his estate in probate proceedings in the City and County of San Francisco, State of California.

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*References to Appendix are to the Appendix to the Petition for Certiorari.

(Appendix 5, Finding 13.) Notice of the petition for letters of administration was given in all respects as required by California law. (Appendix 5, Finding 12.) Petitioner has physical possession of the promissory note of Edward Cebrian but failed to prove a complete chain of title from the original payee. (Appendix 15 and 18, Opinion.) Respondent caused notice to creditors of the estate of Edward Cebrian to be published for the time and in the manner required by California law. (Appendix 6, Finding 17.) No claim was ever filed by any holder of the promissory note in the proceedings for the probate of the estate of Edward Cebrian. (Appendix 6, Finding 17.)

Respondent in her answer and at all stages of this action, in all Courts below, plead, briefed and urged various special defenses based upon the statutes of limitations of California and Kentucky, laches and Petitioner's lack of title to the promissory note, which defenses, in turn, involve questions of conflicts of laws and interpretation of the terms of the note. (R. 19, 20.)

The main issue, and the only issue decided by the District Court, was whether or not Respondent committed such fraudulent acts in connection with the probate of the Edward Cebrian estate that Petitioner and her predecessors should be relieved from their failure to file a probate claim prior to August 26, 1945 against Edward Cebrian's estate. The District Court found that Respondent did not "intermeddle with the proper probate of the estate of Edward Cebrian, deceased, either wrongfully or fraudulently", (Appen-

dix 6, Finding 14), that she did not "conceal, fraudulently or otherwise, the existence of the assets of the said Edward Cebrian" (Appendix 6, Finding 15); that she "committed no fraud, extrinsic in character, with respect to the probate proceedings in the matter of the estate of Edward Cebrian, either in the County of Los Angeles or the City and County of San Francisco, State of California". (Appendix, 8, Conclusion III).

The District Court further found that no acts of the Respondent deprived Petitioner, or her predecessors, of their right to file claims. (Appendix 6, Finding 16.)

ARGUMENT.

1. DISTRICT COURT FOUND ON RESIDENCE ISSUE.

In addition to the foregoing findings of fact made by the District Court, and despite the repeated assertion in the petition that no finding as to Edward Cebrian's residence was made by the District Court, we find this allegation in Respondent's answer.

> "Defendant denies that she concealed, fraudulently or otherwise, the existence of the assets of the said Edward Cebrian, or that she has intermeddled, fraudulently or otherwise, with the jurisdiction of the Los Angeles Superior Court over said assets; defendant avers in this connection that she has inventoried and accounted for all of the assets of the Edward Cebrian estate in the probate proceeding pending in the San Francisco Superior Court and that the Los Angeles Superior Court never had or acquired, nor does it now

have, any jurisdiction over said assets. Defendant denies that the petition filed by defendant in San Francisco was a 'second' petition, but avers that it was the first petition signed and filed. *Defendant denies that her allegation in said San Francisco petition for letters of administration that Edward Cebrian was a resident of the City and County of San Francisco, State of California, at the time of his death was either false or fraudulent but avers that it was true and correct according to the best information and belief possessed by defendant then and now.* Defendant denies that she knew in February, 1945, or at any other time, that Edward Cebrian was a resident of the County of Los Angeles at the time of his death. Defendant avers that such alleged Los Angeles residence was not the fact. Denies that defendant made false or fraudulent allegations of fact to the San Francisco Superior Court in her petition for probate or by any other pleading or evidence; denies that said San Francisco Superior Court relied upon any alleged false or fraudulent representations; denies that said San Francisco Superior Court erred in appointing defendant as administratrix of the Estate of Edward Cebrian, deceased. Defendant denies that she ever wrongfully assumed possession or control of the property of Edward Cebrian".

(R. 15, Answer XI.)

The District Court found this allegation to be true. (Appendix 6, Finding 15 and Appendix 7, Finding 19.) Thus the Court of Appeals did not decide this factual issue de novo, as implied in the Petition (2, Questions Presented 1.)

Evidence as to Residence.

The Petition wholly ignores the evidence upon which the District Court and the Court of Appeals based their findings and conclusions as to Edward Cebrian's San Francisco residence at the time of his death. Instead it sets forth certain factors tending to show Los Angeles residence, with the bald but unfounded assertion that the evidence is uncontroverted. (Petition 5, 6 and 7.) The evidence to the contrary which abundantly supports the findings of the District Court is fairly summarized in the opinion of the Court of Appeals. (Opinion, Appendix 13 to 15.) Since there is no suggestion of any factual error in this summary of the evidence we feel it is unnecessary to repeat it. Suffice it to say that the deposition of Respondent and the testimony of Edwin A. Koch and Ralph J. Cebrian amply support the findings of the Court below on the residence issue.

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2. THE DISTRICT COURT DID NOT DECIDE AS A MATTER OF LAW THAT INTENT TO DEFRAUD IS AN INDISPENSABLE ELEMENT FOR EQUITABLE RELIEF, NOR DID IT PLACE ITS DECISION ON SUCH LACK OF INTENT.

It is true that the District Court found that none of the acts of Respondent in connection with the probate of the estate of Edward Cebrian was performed with any intent to deceive, delay, defraud or mislead creditors. (Appendix 7, Finding 20.) Such finding is supported by evidence and was fully documented in the trial Court. However, there is nothing in that finding, or elsewhere in the findings or conclusions,

which indicate that the general findings that Respondent was innocent of fraud were based solely or in any large measure upon such lack of fraudulent intent.

Lack of intent to mislead surely is an element in any case where fraudulent conduct is alleged. Therefore, when a Court examines a course of conduct and finds that it was not fraudulent, its decision on such a factual issue should not be open to challenge merely because it also finds there was no intent to deceive.

But even assuming an inference could be drawn that the District Court placed its decision solely on the lack of fraudulent intent, we find such a rule fully supported by the highest State Court of California. The case of *Bankers Trust Co. v. Patton* (1934) 1 Cal. (2d) 172 at 178 (33 P. (2d) 1019) involved a charge of fraud brought by a creditor against the administratrix of an estate. She was alleged to have concealed from the California Probate Court the fact that probate proceedings were also pending in Iowa. In holding that she was not guilty of fraud the California Supreme Court said:

> "The plaintiff contends that the defendant Patton must have intended to do what she actually did, viz., fail to divulge the facts to the court in California, and that this state of her mind was sufficient to constitute a wilful suppression under the cases relied upon. There was, however, no absolute duty on her part under the provisions of section 1040 of the Probate Code to present the facts involved unless the failure to do so amounted to active suppression in bad faith, or

> other circumstances were present which would constitute such act or omission a fraud upon the plaintiff. Bad faith, therefore, was a necessary additional element under the facts of the case which must be shown before the defendant may be found guilty of any fraudulent act or omission as to the plaintiff so as to charge her as a trustee. As stated, there is support in the evidence for the trial court's conclusion on this phase of the case."

The essential element in such a case is intent to induce the other party to act or fail to act to the latter's disadvantage. This is not the same as mere intent to deceive. Here the Respondent did not know of the note or its holders in 1945 and, of course, could have had no intent then to cause them to fail to file their claim or do anything else. This is the absence of intent which was and is an essential element of Respondent's defense.

Thus even if we were to conclude that the District Court placed its decision solely upon Respondent's lack of intent that Petitioner or her predecessors should act, or fail to act to their prejudice, such rule is in full accord with California law. (*Gagne v. Bertran* (1954) 43 Cal. (2d) 481, 275 Pac. (2d) 15.) There the Supreme Court of California said in a footnote on page 488 of 43 Cal. (2d):

> "Under this section of the Civil Code (1709) the intent required to prove a cause of action for deceit is an intent to induce action."

3. RESPONDENT'S AFFIRMATIVE DEFENSES WERE EXHAUSTIVELY BRIEFED AND PRESENTED TO THE COURT OF APPEALS.

Petitioner and Respondent each submitted many pages of written argument and briefs to the District Court on the subject of such affirmative defenses as the statutes of limitation of the states of California and Kentucky, the Petitioner's lack of title to the note in suit, the conflicts of law questions, and the interpretation of the language of the promissory note.

The District Court decided in favor of the Respondent on the main fraud issue and, therefore, expressly declined to make findings and conclusions on the affirmative defenses as unnecessary. (Appendix 9, Conclusion VI.)

Nevertheless, in her reply brief in the Court of Appeals, Respondent presented her argument and authorities to the reviewing Court with the following statement in the body of her brief:

> "While it is true these rather complex defenses, which involve interesting and intricate conflicts of law questions, were unnecessary to the decision of this case in view of the findings of fact against appellant's claim of fraud, nevertheless they are matters of law and if this Court were of the view no evidence supported the Trial Court's decision, we submit a decision on these special defenses should be made here, avoiding further delay and expense through remand. Therefore Appellee will present her argument upon such special defenses in an appendix to this brief so that this litigation may be termi-

nated without the necessity of further proceedings in the District Court and later appeal."

Such argument was separated from Respondent's argument on the fraud issue and was made an appendix to the argument on the main fraud issue.

Petitioner chose to file no reply to this portion of Respondent's reply brief at any time before, during or after oral argument in the Court of Appeals, although she did file a reply to the portion dealing with fraud.

Respondent's counsel, during oral argument, called the Court's attention to her special defenses and the portion of her brief in support thereof and argued briefly the salient features of these defenses.

The Petition in effect asks that a Writ of Certiorari issue because:

(i) The special defenses were not argued or briefed in the Court of Appeals; and

(ii) The Court of Appeals should not have devoted any time or attention to such special defenses, because:

(A) The Respondent's brief on these issues was separated from the rest of her brief by a blue page and the word "Appendix"; and

(B) A rule of the lower Court as to the length of briefs was violated. Had this latter objection been made below, which it was not, it cannot be doubted the alleged defect could have been cured.

The mere statement of these assertions indicates matters of form, rather than substance. A Writ of

Certiorari from the Supreme Court of the United States does not srike us as designed for the correction of such trivial matters of procedure.

We observe here also that any alleged defect in these respects could have been readily remedied by a Petition for Rehearing to the Court of Appeals. None was filed.

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4. THE QUESTION OF PLACE OF RESIDENCE WAS DETERMINED BY A FINAL JUDGMENT IN A STATE COURT AND THE DISTRICT COURT WAS PRECLUDED FROM DECIDING THAT ISSUE.

One of Petitioner's main arguments is that the District Court failed to decide the issue as to place of residence but that the Court of Appeals did decide this issue.

We have urged in our Point 1 above that the District Court did in fact make findings on that issue in favor of Respondent. However, if it can be asserted that such findings were not in proper form, there is a basic underlying reason why such a finding as to residence was not required.

The Superior Court of the State of California had made and entered a final judgment in 1945 in which it found as a fact that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death. That finding was made after due legal notice had been given as provided by law and was binding on the whole world, since it was made in an in rem proceeding. (Appendix 4, Findings 11 and 12; Appendix 7, Conclusions II and III.)

Respondent has urged during the entire four years this case has been in litigation that the question of Edward Cebrian's residence is not open for decision as an issue in this case. At the same time, Petitioner has ever attempted by elaborate and resourceful moves to "prove" that Edward Cebrian was a resident of Los Angeles when he died.

A supplemental brief will be filed by Respondent, if permitted by this Court, setting forth the applicable California law on the binding effect of the state Court judgment in the probate proceeding. The leading California cases are:

Alden v. Superior Court (1921) 186 Cal. 309 at 312; 199 Pac. 29;

Holabird v. Superior Court (1929) 101 Cal. App. 49; 281 Pac. 108;

Estate of Relph (1921) 185 Cal. 605; 198 Pac. 639;

Estate of Dole (1905) 147 Cal. 188; 81 Pac. 534;

Estate of Latour (1903) 140 Cal. 414 at 425; 73 Pac. 1070, 74 Pac. 441;

Estate of Griffith (1890) 84 Cal. 107; 24 Pac. 381;

Estate of Spencer (1926) 198 Cal. 329; 245 Pac. 176;

Estate of Estrem (1940) 16 Cal. (2d) 563; 107 Pac. (2d) 36;

Estate of Robinson (1942) 19 Cal. (2d) 534; 121 Pac. (2d) 734;

Estate of Crisler (1948) 83 Cal. App. (2d) 431; 188 Pac. (2d) 772.

5. RESPONDENT COMMITTED NO FRAUD EXTRINSIC IN CHARACTER WITH RESPECT TO THE PROBATE PROCEEDINGS IN THE STATE COURT.

Even if we were to assume that the Probate Court should have found in 1945 that Edward Cebrian was a resident of Los Angeles when he died instead of San Francisco, it does not follow that the final judgment is not binding on Petitioner.

California law on this point is clear and the acts of Respondent do not constitute such extrinsic fraud as will entitle Petitioner to avoid the judgment.

A California probate case involving the finding of residence goes much further than the other cases cited and indeed much further than is necessary to blow away the Petitioner's "residence" issue. In *Estate of Crisler* (1948), 83 Cal. App. (2d) 431, 188 Pac. (2d) 772, a petition to probate the decedent's will was filed in Sacramento County alleging she died in Oregon but was a Sacramento resident. The petition was granted and letters testamentary issued. Later a beneficiary sought to revoke the probate on the ground that decedent was a resident of Oregon at the time of her death and that "there was fraud" when the executor alleged and testified that she was a resident of Sacramento County. Affidavits were filed by the beneficiary in support of this motion. The conflict between the executor's proof of residence as Sacramento County and that of the beneficiary was quite obviously not a showing of extrinsic fraud. The Court closes with the following statement at page 434:

> "Finally it may be stated that even though it could be said that Rodolph's testimony was per-

jured or that he misinformed the court, such acts or statements do not constitute extrinsic fraud but are intrinsic. Extrinsic fraud has been defined as that which has prevented a contestant from presenting his case to the court and does not apply to matter actually presented and considered. (*Zaremba v. Woods,* 17 C.A. 2d 309 (61 P. 2d 967); *O. A. Graybeal Co. v. Cook,* 16 Cal. App 2d 231 (60 P. 2d 525); *Hammell v. Britton,* 19 Cal. 2d 72 (119 P. 2d 333); *Estate of Robinson,* supra.) It must be admitted that the facts and circumstances of the present case do not come within such definition.

"The order appealed from is affirmed."

One interesting observation might be made at this point. Petitioner's predecessor herein appears to have arrived on the scene as owner of the assigned claim sued on here about May, 1950. He admittedly learned of both the San Francisco probate proceeding and the Los Angeles petition for letters at or about that time. Therefore, it is obvious that while she charges the direst forms of fraud and misconduct, it is obvious that such acts charged would not have the slightest effect upon her or her course of action or that of her predecessor's in interest, even if committed as she alleges.

We doubt if the question of where a wanderer resides and has his permanent domicile is ever so obvious *prior to a determination by a Court,* that it can be fraudulent for a relative to make an allegation as to such person's legal domicile in sincere accord with the

affiant's belief. And no one can read all of Respondent's deposition and doubt that in her mind, both in 1945 and now, Edward Cebrian's permanent home was in San Francisco all of his life.

Yet Petitioner contends that voting (which Respondent did not know about in 1945) and physical presence with some possessions is so *conclusive* as to Edward Cebrian's Los Angeles residence that it was active fraud for Repondent even to allege otherwise.

The final order made in San Francisco Superior Court on February 26, 1945, appointing Respondent administratrix was a conclusive determination of the jurisdiction of the Court, including the residence of Edward Cebrian in San Francisco.

Section 302, *Probate Code of California.*

The statute is prefaced by the clause "In the absence of fraud in its procurement". It has been settled in California that the "fraud" referred to in that section is "extrinsic", and not intrinsic fraud.

Estate of Robinson, 19 Cal. 2d 534 at 539; 121 P. 2d 734.

Except for being a much stronger case, we submit the facts of the *Crisler* case demonstrate that any action by Respondent could not possibly constitute "extrinsic" fraud. No act by her prevented Petitioner, or her predecessors, from appearing and filing their alleged claims within the time allowed by law. No such cause and effect relation between their failure and her acts has been shown.

In re Griffith (1890) 84 Cal. 107 at 112-113, 24 P. 381, was another probate matter in which one Gambetta was alleged to have sought letters of administration in San Joaquin County, knowing the decedent was a resident of Alameda County, and knowing also that his name appeared in the great register of Alameda County, all without disclosure to the Probate Court. The Court held this question of fraud alleged to have been committed was not extrinsic or collateral, but pertained to the precise matter before the Court: the residence of the deceased. The decision is based upon the United States Supreme Court case of *U. S. v. Throckmorton,* 98 U. S. 61, which it quotes as follows:

> " 'The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in a matter upon which the decree was rendered.' The principle laid down in this case is in accordance with the weight of authority, and is required by far-reaching considerations of public policy."

To the same effect is *Holabird v. Superior Court,* 101 Cal. App. 49 at 52-53, 281 Pac. 108, cited above.

(A) Extrinsic fraud.

One of the leading cases in California dealing with the distinction between extrinsic and intrinsic fraud is *Pico v. Cohn* (1891) 91 Cal. 129, 25 Pac. 970, 27 Pac. 537. There one Pico sought to set aside a former

judgment which Cohn had obtained against him. It was subsequently discovered that this judgment was obtained largely because Cohn had bribed one Johnson, an eye witness. The fraud of Cohn suborning perjury was held to be intrinsic and the judgment, having become final, the demurrer to the suit in equity to set it aside was sustained.

But from the Pico case and many subsequent cases we can, by example, determine what does constitute extrinsic fraud which entitled the party defrauded to be relieved from a decree so obtained.

(A) Keeping an unsuccessful party away from the Court by a false promise of compromise.

(B) Keeping a party in ignorance of a suit.

(C) Where an attorney fraudulently pretends to represent a party, but connives in his defeat.

Baker v. O'Riordon, 65 Cal. 368, 4 Pac. 232.

(D) Where an attorney fraudulently sells out his client's interests.

(E) Where false affidavits of service of summons or citation are made, no service being made.

Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007.

(F) Where a person *knowingly* omits the names of heirs at law from a *petition for probate* of a will, so that they receive no notice, as required by law.

Zaremba v. Woods (1936) 17 Cal. App 2d 309, 61 Pac. 2d 976;

Probate Code of California, Sections 326, 328.

But see:

Mulcahey v. Dow (1900) 131 Cal. 73, 63 Pac. 158,

and

Lynch v. Rooney (1896) 112 Cal. 279, 44 Pac. 565,

where omitted heirs are held barred by the *decree of distribution.*

(G) Where the party guilty of fraud so misrepresented facts as to prevent the victim from discovering the earlier fraudulent acts which were the basis of the cause of action.

Caldwell v. Taylor (1933) 218 Cal. 471, 23 Pac. 2d 758, 88 A.L.R. 1194.

(H) Where a personal representative of a decedent wilfully suppresses material facts in bad faith for the purpose of preventing creditors from enforcing their rights.

Bankers Trust Co. v. Patton (1934) 1 Cal. 2d 172, 33 Pac. 2d 1019.

(I) Where a plaintiff had a defense and counterclaim but relied on the defendant's representation that if she did not defend he would hold the property in trust for her.

Flood v. Templeton, 152 Cal. 148, 92 Pac. 78.

The quotation of general language and even definitions on the question of whether an established fraud is extrinsic or intrinsic is of little help without a careful study of the facts of each case.

There are some factors which can be distilled from the cases which aid in the determination:

1. The party charged with the fraud must have performed some act or failed to perform some duty imposed upon him by law, which prevented some person affected by the judgment or order from having his or her day in court.

Bankers Trust Co. v. Patton (1934) 1 Cal 2d 172, 33 Pac. 2d 1019;

Caldwell v. Taylor (1933) 218 Cal. 471, 23 Pac. 2d 758.

Thus in *Sohler v. Sohler* (1902) 135 Cal. 323, 67 Pac. 282, and in *Campbell v. Campbell* (1907) 152 Cal. 201, 92 Pac. 184, we have two instances where the party charged with fraud was the mother and natural guardian of minor children who were victimized by her fraud. It was the duty of such mother and natural guardian to represent their interests in the probate proceedings involved, rather than to falsely and fraudulently deprive them of their inheritances at a time when they had no ability or opportunity to defend themselves.

2. The alleged fraud must, of course, *actually* have been effective to deprive Petitioner and her predecessors from having their day in Court.

Assuming that only in Los Angeles County could any valid probate of Edward Cebrian's estate occur, as Petitioner contends and we dispute: Petitioner must show as a minimum requirement to her prayer for equitable relief that solely by reason of the San

Francisco filing her predecessor was prevented or hindered from filing his claim in probate.

The absolute absence of evidence on this score is most eloquent. The evidence suggests the contrary conclusion. It appears that the holders of the note in suit were in a state of complete slumber so far as this asset was concerned from 1938 until Mr. Colville stirred them in 1950, or thereabouts.

Where then is any basis for relief if, conceding all else, Petitioner cannot show that the alleged fraudulent acts of Respondent did in fact prevent her predecessors from enforcing their rights?

Rather the Court is asked to speculate that *if* the probate proceeding had proceeded in Los Angeles the holder of the note would have been "presumed" to have learned of it in time to file his claim in time. The inference must be drawn that it would have made not the slightest difference to the holder of the note where in California Respondent sought administration.

Memory does not serve Respondent's counsel as to any creditor of Edward Cebrian who was in the Los Angeles area, either in 1934 or 1945.

(B) Intrinsic fraud.

Gale v. Witt, 31 Cal. 2d 362, 188 Pac. 2d 755. (Alleged false testimony as to witnessing of a will offered for probate.) Since it was one of the material issues decided in the petition for probate, such false allegation was held to constitute intrinsic, not extrinsic fraud, and to afford no relief in equity.

Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565.

A finding in a decree of distribution as to who was the legal heir is binding and cannot be set aside in a separate suit in equity by other heirs wrongfully omitted. The fraud or mistake was intrinsic.

Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158.

Omitted heirs sought in vain to have a widow of their relative declared an involuntary trustee following a decree of distribution of the relative's estate. It will be noted the omitted heirs lived in other states and had only constructive notice of the proceeding.

In Colville v. Koch it will be remembered that notice of the filing of *both* petitions for probate was given by defendant to the whole world in the only manner recognized by law. She therefore had no duty or opportunity, even if she had known of the note in suit to give the holder any other notice.

3. The party seeking to be relieved from the effect of the judgment or order must demonstrate that his own negligence or laches did not contribute materially to the result.

Petitioner's proof reveals a complete absence of any activity on the part of her predecessors regarding the Cebrian note from 1938 until 1950. They apparently did not even bother to communicate with their California counsel during all this time.

Was it not this very failure to do anything whatever to keep in touch with their alleged debtor or inquire as to his assets or whereabouts that accounts for Petitioner's predecessors in interest failure to file a claim, not any activity Respondent is alleged to have

engaged in? We emphasize, it is whether the holders of this note were or were not misled or hindered by Respondent from filing their claim that is of import here. It matters not whether Cebrian's creditors generally might have known or would have "presumed" the Edward Cebrian's probate proceedings were in Los Angeles.

For all that appears here no holder of the Cebrian note in suit ever knew or heard that Edward Cebrian ever lived in Los Angeles until 1950 or later.

It does not appear that he ever owned real estate in Los Angeles, although the holders of the note knew that he owned land in Santa Barbara, San Luis Obispo and Yolo Counties. All this land was scheduled in his bankruptcy estate.

Respondent feels that the cases, *In re Griffith,* 84 Cal. 107, 24 Pac. 381; *Estate of Crisler,* 83 Cal App. 2d 431, 188 Pac. 2d 772; and *Estate of Robinson,* 19 Cal. 2d 534, 121 Pac. 2d 734, are so nearly parallel in point of fact as well as principle, that they are controlling here.

We submit:

(i) The alleged acts of Respondent, even if fraudulent, had no effect either to prevent Petitioner's perdecessors from appearing to contest the finding as to the residence or from filing a probate claim;

(ii) The Respondent did not act, and refrained from doing no act, which by law she was bound to do at the time she filed her petition for probate in San Francisco, which in any way hindered, misled, de-

ceived or prevented Petitioner's predecessors from appearing in the probate proceeding.

(iii) Petitioner has not sustained the burden of proof on the fraud issue, and that the contrary finding of the District Court is amply supported by the record.

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6. NO ISSUE IN THIS CASE WAS DECIDED IN A WAY IN CONFLICT WITH STATE LAW.

Where Edward Cebrian registered and voted is a factor to be considered in determining the residence of the voter. However, no California case is cited by Petitioner, nor can we find any to support Petitioner's extreme conclusion that voting is *conclusive* and outweighs all other evidence and declarations on the subject. Such is certainly not the law in California. In *Estate of Spencer* (1926) 198 Cal. 329, 245 Pac. 176, we have a collateral attack on an order establishing a decedent's residence. The evidence showed, as here, that the decedent had registered and voted in another county. The Court said:

> "It has been heretofore held by this Court that the mere fact that one is registered in a certain place and has voted therein is not conclusive evidence upon the question of his domicile. (*Bradley v. Davis,* 156 Cal. 267, 104 Pac. 302.)"

The petition sets forth certain factors indicating Los Angeles residence but ignores the great bulk of testimony and documentary evidence on which three different Courts have concluded Edward Cebrian never surrendered his San Francisco residence, despite long sojourns in other cities, states and countries.

With respect to the question of intent, when placed in its proper perspective as an intent to cause another to act or fail to act to the latter's disadvantage, we find the ruling of the District Court in strict conformity with California law. In all events, however, the decision is placed upon the ground (District Court) that Respondent "committed no fraud, extrinsic in character * * *" (Appendix 8, Finding 4) and "in our view (Court of Appeals) appellant (Petitioner) has entirely failed to prove that Isabelle C. Koch (Respondent) * * * was guilty of fraud of any kind or degree in the probate proceedings. * * *" (Appendix 16, Opinion.)

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7. **THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.**

The Court of Appeals *affirmed* the judgment of the District Court. As we have just shown, the Court of Appeals decided the same basic issue (presence or absence of fraud) on the same evidence and with the same conclusion as the District Court. No new evidence was introduced before the Court of Appeals. Furthermore, as we have shown, no new argument or authorities were presented to the Court of Appeals which had not been exhaustively argued and presented in written trial briefs to the District Court by both parties. This applies not only to the main fraud issue but also to the special affirmative defenses.

Petitioner was not taken by surprise in connection with these special defenses. She alone must accept the

results of the gamble she took of ignoring them on her appeal to the Court of Appeals.

Finally, we come to the argument that the Court of Appeals might have read and considered more than the maximum eighty (80) pages of Respondent's brief on appeal, notwithstanding a Rule of Court limiting such briefs to eighty (80) pages without leave of Court. We feel this is a matter the Court of Appeals would readily have remedied had Petitioner felt the defect in procedure substantial. Beyond this we can not seriously dignify this reason for a Writ by further discussion.

CONCLUSION.

The District Court made findings of fact and conclusions of law upon a considerable mass of oral and documentary evidence and after several general and specific briefs were requested and filed by each party. The Court of Appeals affirmed the judgment of the District Court in every respect. The decision is in accord with and based upon well established California precedents. No rule of procedure worthy of mention was violated.

Respondent respectfully prays that the Writ of Certiorari be denied.

Dated, San Francisco, California,
October 22, 1956.

Respectfully submitted,
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